

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 18, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2525

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

PRECISION ERECTING, INC.,

PLAINTIFF,

V.

**AFW FOUNDRY, INC., M&I MARSHALL &
ILSLEY BANK, G.A.P., INC., CENTRAL
ACOUSTICAL SUPPLY HOUSE AND
VERHALEN, INC.,**

DEFENDANTS,

AFW FOUNDRY, INC.,

**DEFENDANT-THIRD PARTY
PLAINTIFF-RESPONDENT,**

V.

CIRCLE ELECTRIC, INC.,

**THIRD PARTY DEFENDANT-
APPELLANT,**

SCHMITZ READY MIX, INC., LIPPERT TILE COMPANY, INC., RBA, INC., CEDARBURG LUMBER COMPANY, AUGUST H. WULF COMPANY, INC., NAMBE MILLS, INC., WASTE MANAGEMENT, INC., A & R DOOR SERVICE, INC., AATFAB CORPORATION, D/B/A CARPENTER TECHNOLOGY COMMUNICATIONS & SECURITY, AMERICAN K-9 SERVICES, INC., BONAFIDE DOORS & HARDWARE, INC., JBD ENTERPRISES, LABOR READY, INC., ANTONIC & ASSOCIATES, LTD., AND AGT CORPORATION,

THIRD PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Waukesha County:
ROGER MURPHY, Judge. *Affirmed.*

Before Brown, Nettesheim, and Anderson, JJ.

PER CURIAM. Circle Electric, Inc., as a subcontractor retained by Antonic & Associates, Ltd., provided services and materials at property owned by AFW Foundry, Inc. Circle Electric appeals from a default judgment which declares that AFW need only pay Circle Electric \$.27 on the dollar of its unpaid bill. Circle Electric argues that the default judgment is without a basis because AFW's third-party complaint failed to state a claim for relief, that the default judgment was premature because its late answer to the complaint had not been struck, that there was excusable neglect for Circle Electric's failure to timely answer the complaint, and that there was not adequate notice of the default motion. We conclude that the trial court did not erroneously exercise its discretion and affirm the judgment.

General contractor Antonic failed to complete the job at the AFW site. It did not pay in full any of the subcontractors. AFW settled with a great

many of the subcontractors and paid them the equivalent of \$.27 on the dollar. Precision Erecting, Inc., a subcontractor, rejected AFW's offer to settle and brought this action against AFW to recover sums not paid for labor and materials supplied at the AFW site. AFW filed a third-party complaint naming all remaining unpaid subcontractors, including Circle Electric, as third-party defendants. AFW sought a declaratory judgment as to the subcontractors' pro rata entitlement to the remaining sum due Antonic under the construction contract, after deduction of the settlement payments already made.

The third-party complaint was filed April 24, 1996, and served on Circle Electric on May 3, 1996. On June 6, 1996, AFW filed a motion for default judgment against Circle Electric. The notice of motion indicated that the hearing was set for July 1, 1996, at 3:30 p.m. On June 13, 1996, Attorney Patrick Hudec filed a notice of appearance on behalf of Circle Electric. Circle Electric also filed an objection to the default motion and an answer and counterclaim that same day. On July 1, 1996, Hudec sent a letter to the court by facsimile indicating that by his receipt of a facsimile letter from another attorney at 12:10 p.m. that day, he first became aware of the hearing set for that day. Hudec appeared for Circle Electric at the hearing. The court granted the default judgment upon finding that Circle Electric's answer was late and that no motion to extend the time for filing an answer had been filed.

The question of whether a default judgment should be granted is within the trial court's discretion. *See Riggs Marine Serv., Inc. v. McCann*, 160 Wis.2d 846, 850, 467 N.W.2d 155, 157 (Ct. App. 1991). The mere failure of a party to timely join issue does not, as a matter of right, entitle the other party to a default judgment. *See id.*

We agree with Circle Electric that the first step in default judgment methodology is a determination of whether the complaint states a claim for relief. However, we disagree with Circle Electric's proposition that the complaint must state a claim on which the claimant can unconditionally prevail. In determining whether a cause of action for declaratory judgment is stated, the question is not whether the complaint states a meritorious cause of action upon which the plaintiff should prevail on the merits, but rather whether the declaratory judgment device may be used to adjudicate the plaintiff's claim. *See Waukesha Mem'l Hosp. v. Baird*, 45 Wis.2d 629, 633, 173 N.W.2d 700, 702 (1970). *See also Bence v. City of Milwaukee*, 84 Wis.2d 224, 231, 267 N.W.2d 25, 28 (1978).

AFW alleged that under its contract with Antonic a certain sum remained due but that subcontractors were seeking amounts in excess of that sum. AFW sought a declaration of its obligation to the subcontractors under the contract. The complaint states the existence of a controversy that needs to be settled. A claim for declaratory relief is stated. *See id.* at 231, 267 N.W.2d at 29. It is not relevant that AFW may not have succeeded on its claim that all of the subcontractors were to be paid only \$.27 on the dollar.

Circle Electric next contends that default judgment was improper because there was no motion to strike its late answer. It is error to enter a default judgment when an untimely answer has been filed without entertaining and granting a motion to strike the answer. *See Reynolds v. Taylor*, 60 Wis.2d 178, 179, 208 N.W.2d 305, 306 (1973). We conclude that the trial court implicitly struck the late answer. It found that Circle Electric had not made the required motion to extend the time for filing an answer. *See* § 801.15(2)(a), STATS. Thus, the trial court considered the answer a nullity. A formal motion to strike was not necessary.

Moreover, the trial court's failure to expressly state that the answer was stricken "should not undo what nonetheless is clearly conveyed by the words and the procedure which the court otherwise did use." *State v. Coles*, 208 Wis.2d 328, 335, 559 N.W.2d 599, 601-02 (Ct. App. 1997). *Martin v. Griffin*, 117 Wis.2d 438, 344 N.W.2d 206 (Ct. App. 1984), illustrates this principle. In *Martin*, the defaulting party's answer was filed after the motion for a default judgment. *See id.* at 441, 344 N.W.2d at 208. Noting that the answer must first be stricken before granting default judgment, the court determined that the requisite motion to strike is subsumed in the trial court's determination of whether the failure to answer was the result of excusable neglect. *See id.* at 441-42, 344 N.W.2d at 209. "The excusable neglect standard for determining whether to strike an untimely answer is substantially equivalent to the excusable neglect standard for granting a default judgment." *Id.* at 442, 344 N.W.2d at 209. In determining that Circle Electric's failure to timely answer the complaint was not due to excusable neglect, the trial court implicitly struck the late answer.

"Excusable neglect is 'that neglect which might have been the act of a reasonably prudent person under the same circumstances' and is not synonymous with neglect, carelessness or inattentiveness." *Id.* at 443, 344 N.W.2d at 209 (quoted source omitted). Circle Electric argues that it believed it did not need to respond to the complaint because counsel for Precision Erecting was representing the interests of the subcontractors. It also believed that no answer was necessary because the complaint failed to state a cause of action.

There is no factual basis for Circle Electric's claim that counsel for Precision Erecting had assumed the duty of representation. In any event, neither belief that Circle Electric possessed about not having to file an answer constitutes excusable neglect. *See id.* at 443-44, 344 N.W.2d at 209-10 (insurance company's

belief that an answer filed by another insurer believed to provide primary coverage was adequate to protect its interests and that no answer was required is not excusable neglect). “The existence of a meritorious defense has no bearing on whether the neglect was excusable.” *Id.* at 444, 344 N.W.2d at 210.

Circle Electric also suggests that there was some confusion about service of the summons and complaint. The motion for default judgment included an affidavit of service that the summons and complaint had been served on Circle Electric by personal service on Robert Mueller. The objection to the motion for default asserted that “[a]t this time, Circle Electric, Inc., cannot identify who was served at the corporate office with the Third-Party Summons and Complaint.” However, the supporting affidavit of Mueller, officer and co-owner of Circle Electric, did not indicate that he had not been served with the summons and complaint. The trial court’s finding that Circle Electric was properly served with the complaint on May 3, 1996, is not clearly erroneous. *See* § 805.17(2), STATS. Circle Electric’s claim of inadequate service lacks merit and does not establish excusable neglect for the failure to timely file an answer.

The final claim is that Circle Electric’s attorney was not given sufficient notice of the default motion hearing on July 1, 1996. The notice of motion hearing was served by mail on Circle Electric on June 4, 1996, well within the required five days notice under § 801.15(4), STATS. Circle Electric’s attorney did not make an appearance until after the notice of hearing and motion for default judgment had been filed. Circle Electric’s claim that all parties were required to serve all pleadings previously filed in the action on subsequently retained counsel has no support in the rules of civil procedure.

Circle Electric's claim of inadequate notice is specious in light of the objection to the default motion filed by Circle Electric's attorney on June 13, 1996. It is apparent from the objection that Circle Electric's attorney was aware of the pending motion. The notice of the hearing was incorporated in the motion. Circle Electric's attorney could not review the motion without reading the notice of the hearing.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

